83-2132

No. .....

IN THE

Supreme Court of the United States

October Term, 1983

LUCKY STORES, INC.,

Petitioner,

vs.

JOHN GARIBALDI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

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Of Counsel:
O'MELVENY & MYERS,
GORDON E. KRISCHER,
JOEL M. GROSSMAN.

QUESTION PRESENTED.

After an arbitrator in an arbitration proceeding held pursuant to a collective bargaining agreement enforceable under Section 301 of the Labor Management Relations Act has rejected an employee's claim of retaliatory discharge, may the employee bring a state common law action for wrongful discharge in violation of public policy alleging the same claim of retaliatory discharge?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Petitioner Lucky Stores, Inc. prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Ninth Circuit, rendered in these proceedings on February 27, 1984.

OPINIONS BELOW.

Respondent was discharged from employment and a grievance challenging his discharge was filed pursuant to the applicable collective bargaining agreement. An arbitration was held before a neutral arbitrator to determine whether Petitioner retaliated against Respondent by discharging him without cause because, *inter alia*, he reported allegedly impure milk to state health authorities. The arbitrator held that the discharge was for good cause and was not retaliatory. The arbitrator's award is reproduced as Appendix A hereto.

On January 17, 1983 the Honorable Lawrence T. Lydick, United States District Judge for the Central District of California, granted summary judgment to Petitioner dismissing Respondent's first cause of action for

wrongful discharge.* The court's unpublished order is reproduced as Appendix B hereto. The transcription of the court's bench order is reproduced as Appendix C hereto.

Respondent appealed to the United States Court of Appeals for the Ninth Circuit. The Ninth Circuit reversed the dismissal in an opinion by Judge Fletcher published at 726 F.2d 1367 (9th Cir. 1984). The opinion is reproduced as Appendix D hereto.

JURISDICTION.

Jurisdiction below was invoked pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. §185 and 28 U.S.C. §1441. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) for review by writ of certiorari. By order of this Court dated May 10, 1984, Petitioner's time in which to file the instant petition was extended to and including June 28, 1984.

STATUTES INVOLVED.

Title 28, United States Code:

> "*§1254. Courts of appeals; certiorari; appeal; certified questions*
>
> Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; . . . ."

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*The District Court remanded the second cause of action for intentional infliction of emotional distress to state court. The second cause of action was not before the Ninth Circuit, and is not a part of this petition.

Title 29, United States Code:

"*§185. Suits by and against labor organizations Venue, amount, and citizenship*

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE.

Respondent, a former truck driver, was terminated on October 23, 1980 for poor performance after receiving numerous warnings. Some twenty months earlier, Respondent had notified California health authorities that a load of milk he was driving appeared to be impure. At all relevant times, his union, Local 952, International Brotherhood of Teamsters, Chauffeurs, Warehousemen, and Helpers of America ("Local 952") and Petitioner

were parties to a collective bargaining agreement which provided that employees could only be discharged for "good cause." App. A at A-2.

Local 952, on behalf of Respondent, filed a grievance alleging that Respondent was discharged without good cause. The grievance was not settled and proceeded to arbitration before a neutral arbitrator for a final and binding resolution. App. A at A-2. There, Local 952 argued, *inter alia,* that Respondent was wrongfully terminated without good cause in retaliation for reporting a load of bad milk to state health authorities. App. A at A-3, 4. This retaliation claim is exactly the same one which Respondent seeks to litigate in the state law wrongful discharge lawsuit dismissed by the District Court.

The arbitrator fully considered the allegation of retaliation, and ruled that the discharge was for good cause, specifically because of Respondent's repeated failure properly to perform his duties after receiving several written warnings. The arbitrator expressly found that the discharge was not in retaliation for Respondent's reporting Petitioner's bad milk to state authorities. The arbitrator found as follows:

> "The Union claims that based on the first incident referred to above [Respondent's reporting of bad milk] the grievant was targeted for termination and that the company methodically built up a case against the grievant .... No credible evidence was presented to substantiate the allegation that the grievant was harassed or unlawfully discriminated against." App. A at A-4, 5.

Because he found no retaliatory motive, and that there was good cause for the discharge, the arbitrator upheld the discharge.

Not satisfied with the arbitration award, respondent filed the instant action in state court for wrongful discharge and for intentional infliction of emotional distress. Petitioner removed the action to federal court invoking jurisdiction under section 301 of the Labor Management Relations Act, 29 U.S.C. §185 and pursuant to applicable Ninth Circuit precedent. *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980). Petitioner then moved to dismiss the entire action on the ground, *inter alia,* that under clear federal common labor law the arbitration award was final and binding. Deeming the motion to dismiss a motion for summary judgment, the lower court granted the motion as to the first cause of action for wrongful termination, and remanded the second cause of action to state court.

The Ninth Circuit reversed. It held that the state wrongful discharge cause of action is not preempted, citing this Court's decision in *Farmer v. United Brotherhood of Carpenters and Joiners,* 430 U.S. 290, 97 S. Ct. 1056, 51 L.Ed. 2d 338 (1977). In *Farmer*, the Court held that a union member's tort action for intentional infliction of emotional distress against his union was not preempted by federal labor law. *Farmer* did not involve the finality of labor arbitration awards.

The Ninth Circuit also determined that the arbitration award is not a bar to the instant wrongful discharge action. In reaching this result, the court relied on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36. 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). There, this Court held that an arbitration award that an employer had not violated the non-discrimination clause of a collective bargaining

agreement would not bar a federal action for employment discrimination under a federal statute: Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e *et seq.* ("Title VII"). The instant case does not involve any similar federally created cause of action.

REASONS FOR GRANTING THE WRIT.

1. The Decision Below Is in Direct Conflict With a Decision of the Seventh Circuit.

Over the past several years, state courts have created a rapidly growing body of law concerning wrongful discharge of employees at-will who work without benefit of any written contract or collective bargaining agreement. *See generally, Annot.*, 12 A.L.R. 4th 544 (1983).* In several of these cases courts have created exceptions to the traditional employment at-will doctrine, holding that employees otherwise terminable at the employer's will could not be terminated for a reason which contravenes public policy. *See, e.g., Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973) (employee cannot be terminated in retaliation for filing workers' compensation claim); *Tameny v. Atlantic Richfield Company*, 27 Cal.3d 167, 164 Cal. Rptr. 839 (1980) (employee cannot be terminated for refusing to engage in alleged antitrust law violations).

Two federal circuit Courts of Appeals have now faced the question whether this developing body of judicially-created wrongful discharge law applies to employees

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*Among the many recent cases and commentary concerning the erosion of the employment at-will rule, *see, Parnar v. Americana Hotels, Inc.*, 65 Haw. 370, 652 P.2d 625 (1982); *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983); Note, *Defining Public Policy in At-Will Dismissals*, 34 Stan. L.Rev. 153 (1981); "The Employment At-Will Issue," Daily Lab. Rep. (BNA) No. 225 (Nov. 19, 1982). According to the Bureau of National Affairs, 29 states now recognize some exception to the employment at-will rule. See Daily Lab. Rep. (BNA) No. 59, at C-1 (March 27, 1984).

represented by a union and covered by a collective bargaining agreement which provides for final and binding arbitration and which is enforceable under §301 of the Labor Management Relations Act, 29 U.S.C. §185. In the instant case, the Ninth Circuit held that this state-created law does apply to such union-represented employees. In *Lamb v. Briggs Manufacturing, A Division of the Celotex Corp.*, 700 F.2d 1092 (7th Cir. 1983), the Seventh Circuit faced virtually the same issue and reached the opposite result.

In *Lamb*, an employee brought an action for wrongful discharge, alleging that he was discharged in retaliation for filing a workers' compensation claim.* As in the instant case, the plaintiff in *Lamb* was not an at-will employee, but was covered by a collective bargaining agreement which included a "just cause for discharge" provision and grievance and arbitration machinery. Following his discharge, the plaintiff's grievance was submitted to arbitration. Although the arbitrator found for the plaintiff, and ordered him reinstated with full back pay, the plaintiff, apparently seeking punitive damages available in tort, filed a wrongful discharge lawsuit. The district court granted the employer's motion for summary judgment, holding that plaintiff's state law claim was preempted by his exclusive, federally sanctioned arbitral remedy.

The Seventh Circuit affirmed, stressing the importance of the finality of the arbitration remedy as set forth by this Court in a series of three cases that have come to be known as the *Steelworkers Trilogy: United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), *United*

*Such a retaliatory discharge constitutes a tort under Illinois law and would give rise to a cause of action for retaliatory discharge in violation of public policy. *See Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978).

Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). The Seventh Circuit stated:

> "To permit an employee to circumvent procedures mutually agreed upon for handling grievances by filing suit in the first instance would undermine the collective bargaining agreement. Grievance procedures, including arbitration, were set up to prevent industrial strife. (See *United Steelworkers of America v. Warrior & Gulf Navigation Co.* (1960), 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409.) To permit these procedures to be circumvented in a situation where the employee is protected by the procedures is to invite strife unnecessarily. The employee has a remedy in contract, and to expand the tort of retaliatory discharge to include the instant situation is not only unnecessary but counterproductive as well." 700 F.2d at 1095, *quoting Cook v. Caterpillar Tractor Co.*, 85 Ill. App. 3d 402, 406, 407 N.E.2d 95 (1980).

In *Lamb*, the Seventh Circuit held that a state law retaliatory discharge action is not available to an employee covered by a collective bargaining agreement which provides for arbitration of his discharge after an arbitrator has decided the discharge dispute. The Ninth Circuit, without citing either the *Steelworkers Trilogy* or *Lamb*, held below that an employee who had already submitted his retaliatory discharge claim to arbitration under a collective bargaining agreement is nevertheless free to ignore the arbitration award sustaining his discharge and pursue a state law retaliatory discharge action.

2. The Decision Below Raises an Important Question of Federal Labor Law Which Should Be Decided by This Court: Whether the Federal Rule of Finality of Labor Arbitration Awards Will Be Overruled in Favor of State Common Law Claims That a Discharge Is Contrary to Public Policy.

In *Textile Workers Union v. Lincoln Mills of Alabama,* 353 U.S. 448, 1 L.Ed.2d 972, 77 S.Ct. 912 (1957), this Court held that federal district courts have jurisdiction to compel an employer to arbitrate a dispute which is within the bounds of the collective bargaining agreement's grievance procedure. The Court explained that in enforcing §301 of the Labor Management Relations Act, courts must apply federal common labor law, "which the courts must fashion from the policy of our national labor laws." 353 U.S. at 456.

Following *Lincoln Mills,* this Court in the *Steelworkers Trilogy* held, as a matter of federal common labor law, that once an arbitrator has decided a dispute, the merits of the dispute may not be reviewed by a court:

> "The refusal of courts to review the merits of an arbitration award is the proper approach to arbitration under collective bargaining agreements. The federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards." 363 U.S. at 596.

In the years since the *Steelworkers Trilogy,* the Court has made clear that a union-represented employee who has arbitrated his discharge pursuant to a collective bargaining agreement, may not relitigate his claim in court. In *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554, 96 S. Ct. 1048, 47 L. Ed. 2d 231 (1976), the Court underscored the principles which it had established in the *Steelworkers Trilogy,* explaining that courts:

> "should not undertake to review the merits of arbitration awards but should defer to the tribunal chosen by the parties finally to settle their disputes. Otherwise, 'plenary review by a court on the merits would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final.'" 424 U.S. at 563. *Quoting, United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 599.

In *Hines*, the Court held that a narrow exception to the finality rule would exist where the employee could show that the union's representation of him was discriminatory or in bad faith. Absent such a showing, the finality rule must apply even if it later becomes clear that the arbitrator was wrong. The Court explained that the finality principle is so important that employees may not relitigate their discharge even if newly discovered evidence shows that the "charges against them were false and that in fact they were fired without cause." The Court stated:

> "The grievance process cannot be expected to be error-free. The finality provision has sufficient force to surmount occasional instances of mistake." 424 U.S. at 571.

In the present action there has been no showing, or even an allegation, that Respondent's union in any way failed to represent him fairly.

This Court created a second narrow exception to the finality rule in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 S.Ct. 1011, 39 L.Ed.2d 147 (1974). In that case, the Court held that an arbitrator's decision that an employer had not violated the non-discrimination clause of a collective bargaining agreement would not bar a subsequent lawsuit under Title VII. Similarly, in *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 101 S.Ct. 1437, 67 L.Ed.2d 641 (1981), the Court held that

an arbitrator's decision that an employer did not violate the collective bargaining agreement by refusing to compensate its drivers for time spent inspecting their trucks would not preclude a private action by the employees under the Fair Labor Standards Act, 29 U.S.C. §§201 *et seq.* More recently, the Court extended this rationale to an action under 42 U.S.C. §1983. *McDonald v. City of West Branch, Michigan,* ____ U.S. ____, 80 L.Ed.2d 302, 52 U.S.L.W. 4457 (April 18, 1984). Taken together, these three cases establish a narrow exception to the finality rule because, as the Court stated in *McDonald*:

> "*Congress intended the statutes at issue in those cases* to be judicially enforceable and that arbitration could not provide an adequate substitute for judicial proceedings in adjudicating claims *under those statutes.*" 52 U.S.L.W. at 4459. (Emphasis added.)

The exception is based on this Court's understanding of congressional intent in enacting federal statutes and accommodating these statutes to federal labor policy.

The Ninth Circuit erroneously expanded this exception in an unprecedented manner in this case. In *Gardner-Denver,* the Court noted that arbitrators had no particular expertise in interpreting the intricacies of Title VII. Similarly, in *McDonald,* the Court noted that "[a]n arbitrator may not . . . have the expertise required to resolve the complex legal questions that arise in §1983 actions." 52 U.S.L.W. at 4459. By contrast, the type of claim asserted here is an example of an ordinary and typical workplace dispute which can easily and fairly be determined by an arbitrator. Arbitrators have a great deal of expertise in making the subsidiary factual findings, as well as ultimate finding, as to whether there is good or just cause for a particular discharge. Indeed, the good or just cause for discharge arbitration is a routine occurrence in American industrial life, operating to resolve

workplace disputes quickly while relieving the judicial system of extra weight.*

In the instant case, Respondent's allegation that there was no good cause for his discharge because he was terminated in retaliation for reporting bad milk to the state raises exactly the type of question at which arbitrators are expert — why was the employee discharged? There was no complicated or intricate question of statutory construction; the only questions were why Respondent was discharged and whether there was good cause for the discharge.**

The important question of federal labor law presented by the decision below is whether the narrow exception to the finality rule established in *Gardner-Denver* will be expanded to wrongful termination cases arising under

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*Statistics compiled by the Federal Mediation and Conciliation Service ("FMCS"), indicate that in fiscal year 1981, 6,817 arbitration awards were issued under FMCS auspices regarding interpretation of the terms of collective bargaining agreements. Of these, virtually one half involved discharge or discipline of employees. See, *34th FMCS Ann. Rep. 41*. These cases accounted for only a small portion of all collective bargaining agreement discharge arbitrations. For example, during 1980 the American Arbitration Association ("AAA") accepted 11,949 private sector labor disputes. *Labor Relations Yearbook* — 1981 (BNA) at 141-42 (1982). No doubt at least a similar percentage of the AAA's caseload, or some 5,000-6,000 disputes, related to discharge or discipline. Many arbitrations are also arranged directly by unions and employers without the aid of the FMCS, AAA or other similar organizations. According to a recent sample survey, 94% of collective bargaining agreements contained provisions regarding causes for discharge, and 100% included grievance and arbitration provisions. 2 *Collective Bargaining Negotiations And Contracts* (BNA) 40:1, 51:1 (1984).

**A review of the arbitrator's award in the instant case makes this clear. The arbitrator was fully informed of the allegation concerning reporting bad milk, and was presented with Respondent's entire work record. The arbitrator reviewed the factual issues fully, and determined that Petitioner was not motivated by the bad milk incident, which preceded Respondent's discharge by some twenty months.

rapidly developing state common law. The decision below creates a new and potentially limitless exception to the finality rule, permitting an employee to evade the teaching of the *Steelworkers Trilogy* and of *Hines,* and to relitigate his arbitration, not by relying on a federal statute which expressly provides to him a private right of action and judicial redress, but by merely alleging that his termination was contrary to public policy.

The importance of this issue can hardly be overestimated. Unlike the *Gardner-Denver* exception, this new exception to the finality rule would quickly swallow the rule. Imaginative plaintiffs' counsel could almost always invent some theory upon which to base an allegation that a particular discharge contravened public policy.* The term "public policy" itself defies any meaningful definition in this context, and there can be no doubt that under

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*In recent cases, plaintiffs not covered by collective bargaining agreements have alleged that their termination was contrary to public policy in a wide variety of circumstances. Thus, public policy cases were brought by an employee allegedly fired for notifying his employer that he intended to attend law school, *Scroghan v. Kraftco Corp.*, 551 S.W.2d 811 (Ky. App. 1977); an employee alleging that she was discharged for refusing to work on experiments with a drug she deemed unsafe, *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980); an employee alleging that he was terminated for refusing to lobby the state legislature for a bill favored by his employer, *Novosel v. Nationwide Insurance Co.*, 721 F.2d 894 (3d Cir. 1983); and an employee alleging that she was terminated because she could not work the required hours due to a non-work related injury, *Scarpace v. Sears Roebuck & Co.*, 113 Wis. 2d 608, 335 N.W.2d 844 (1983). *See generally,* Note, *Limiting the Right to Terminate at Will — Have the Courts Forgotten the Employer?* 35 Vand L. Rev. 201, 216-222 (1983).

such a nebulous standard the federal labor law rule of finality of arbitration awards would quickly disappear.*

Moreover, many multi-state employers operate with a single collective bargaining agreement covering employees in different states. Because different state courts decide public policy cases differently, however, the termination of an employee for a particular reason may be deemed contrary to public policy, and actionable in one state, while the same reason is not contrary to public policy in another state.** Thus, under the same collective bargaining agreement and given the same set of facts, an arbitrator's award in one state would be final and nonreviewable while in another state it would not. Such a situation is wholly incompatible with the concept of a national labor policy and this Court's vision of a uniform

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*Even among those courts which have recognized a cause of action for wrongful termination contrary to public policy, some have candidly admitted that no one really knows what is or is not contrary to public policy. As the Illinois Supreme Court acknowledged: "the Achilles heel of the principle lies in the definition of public policy." *Palmateer v. International Harvester Co.*, 85 Ill.2d 124, 421 N.E.2d 876, 878 (1981). In one case, the court held that the determination of what is public policy must be submitted to the jury. *Cloutier v. Great Atlantic & Pacific Tea Company*, 121 N.H. 915, 436 A.2d 1140 (1981).

**For example, California does not deem it contrary to public policy to discharge an employee because he has filed a lawsuit against the employer, *Becket v. Welton Becket & Associates*, 39 Cal. App. 3d 815, 114 Cal. Rptr. 531 (1974), while another court has held that an employee could not be fired in retaliation for bringing a negligence action against the employer. *See Smith v. Off Shore Boat Service, Inc.*, 653 F.2d 1057 (5th Cir. 1981). Similarly, some courts have held that it contravenes public policy to discharge an employee in retaliation for filing a worker's compensation claim, *see Kelsay v. Motorola, supra*, and some have not. *See, e.g., Dockery v. Lampart Table Co.*, 36 N.C. App. 293, 244 S.E.2d 272, *cert. denied*, 295 N.C. 465, 246 S.E.2d 215 (1978). Moreover, some states, such as New York, do not recognize any cause of action for wrongful discharge in violation of public policy. *See, Murphy v. American Home Products Corp.*, 58 N.Y.2d 293, 461 N.Y.S.2d 232 (1983).

body of federal labor law as discussed in *Lincoln Mills, supra.*

The impact of the decision below on industrial life and on court dockets is clear: a dramatic increase in wrongful discharge court actions in two ways. First, many employers understandably will refuse to agree in their collective bargaining agreements to arbitrate discharge disputes, knowing that if the employee loses he can file a wrongful discharge action in court. Thus, thousands of such disputes now heard by arbitrators will be heard by courts instead. Second, many of those discharge disputes which are submitted to arbitration can and will be relitigated in state or federal court if the employee loses. Whether the dispute is being heard for the first or the second time, it is now destined ultimately to be heard by a court, further burdening an already overloaded judicial system.

CONCLUSION.

For all of the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,
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Of Counsel:

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JOEL M. GROSSMAN.

June 27, 1984

APPENDIX A.

IN THE MATTER OF ARBITRATION

BETWEEN

LUCKY STORES, INC.

and

TEAMSTERS UNION LOCAL 952

BEFORE

MELVIN R. DARROW
ARBITRATOR

DATE OF HEARING

December 8, 1980

I. *SUBMISSION AGREEMENT*

The parties agreed that the issue in the instant case is as follows:

1. Whether or not the grievant, John Garibaldi, was discharged for cause.
2. Whether or not the Company, Lucky Stores, Inc., harassed or unlawfully discriminated against the grievant for his participation in protected concerted activities?
3. If the answer to I or II is in the affirmative, what is the remedy?

II. *FURTHER STIPULATION*

The parties agreed that this matter is properly before this Arbitrator for final and binding resolution.

III. *PERTINENT PROVISIONS OF THE LABOR AGREEMENT*

ARTICLE V DISCHARGES AND SENIORITY

A. The Employer shall have the right to discharge any employee for good cause....

B. Except for discharge for dishonesty, intoxication, flagrant insubordination, or flagrant disobedience of posted company rules, an employee shall not be discharged or subject to disciplinary layoff unless he has had one previous warning notice in writing with a copy to the Union for an offense committed within 365 days prior to the date of discharge...

IV. *POSITION OF THE COMPANY (SUMMARIZATION)*

Mr. Garibaldi's tenure of employment with the Company is replete with continuous verbal consultations, verbal warnings and several written warnings advising

the grievant that his job performance was substantially below established Company standards and the contractually negotiated standards met by his co-workers.

The Company believes that Arbitrators generally agree that the employees overall employment record is a major factor in the determination of the proper penalty for the Grievant's offense. In this instance, the general pattern of the grievant's unsatisfactory conduct and performance is preponderant evidence justifying discharge.

The Company rejects the Union's allegation that Mr. Garibaldi was harassed because he transported milk that was declared unsalable to the public and that he had filed a two week Worker's Compensation claim in June, 1980.

The first incident occurred one year and eight months prior to the discharge and no proof was offered by the Union in defense of its position. The other allegation is based upon "surmise, inference or conjecture." Other employees have filed other and similar claims and not one has ever claimed harassment or discrimination because of the action.

The Company has presented a quantity of proof necessary to warrant the discharge of John Garibaldi for just cause.

V. *POSITION OF THE UNION (SUMMARIZATION)*

The Company attempted to foist bad milk on an unsuspecting public. Since this was reported by Mr. Garibaldi, he has been targeted for termination. The Company has methodically built up a case against the grievant, initiating incidents or finding fault over minor derelictions which other drivers would be treated lightly for.

The incident giving rise to the grievant's discharge was grossly exagerrated. The union believes that the store employees placed the blame for the delays on Mr. Garibaldi in order to save their own jobs. Mr. Garibaldi's explanation is credible and should be accepted as fact.

Even if the Company's claims are given credit, the discharge is too severe a penalty. The Company gave warnings but no suspension was ever imposed. Absent a flagrant offense, which we believe did not occur, progressive discipline should be followed, i.e., verbal, written warnings, suspension and finally discharge.

In light of the nature of the offenses, Garibaldi should have received no more than a one-week suspension. He should be reinstated with full back pay or at the most, a week's suspension.

VI. *BACKGROUND AND OPINION*

A. Harassment and Discrimination

On March 27, 1979 the grievant, John Garibaldi, took a "Hot" load of milk to the Dairy Plant where the milk was tested and found to be good.

Before making his first delivery the grievant determined to call the health department and report that he had a "hot" load of milk. The health department met the truck at the first stop and condemned the load.

In a later conversation at his second stop the grievant told Ronald Baker, Transportation Supervisor, that he had called the Health Department because he felt that he was responsible for the load. Mr. Baker informed him that once the Dairy Plant said the load was acceptable, his responsibility was to deliver the product and not to question others' judgment.

In June, 1980, the grievant filed a Worker's Compensation Claim. He was denied benefits.

The Union claims that based on the first incident referenced above, the grievant was targeted for termination and that the company methodically built up a case against the grievant, finding fault over minor derelictions which would be overlooked otherwise.

Surveying the disciplinary record submitted into evidence, the Company followed an acceptable process of progressive discipline for failure to perform his duties and follow the instructions of supervision which ultimately led to the grievant's termination.

No credible evidence was presented to substantiate the allegation that the grievant was harassed or unlawfully discriminated against. To the contrary, it appears that he was given every opportunity to correct his unsatisfactory performance.

For these reasons it is found that the Company, Lucky Stores, Inc. did not harass or unlawfully discriminate against the grievant for his participation in protected concerted activities.

B. Discharged For Cause

The grievant, John Garibaldi, was hired by Lucky Stores, Inc., in April, 1977. At the time of his suspension on October 3, 1980 and subsequent termination he was classified as a Driver.

Mr. Garibaldi was issued a series of written warnings prior to his termination. All of these notices were for similar reasons, e.g., failure to perform duties as normally required, failure to follow supervisor's instructions, and failure to follow driver's instructions.

On October 11, 1979, the grievant's supervisor issued the following written warning:

> *FAILURE TO PERFORM DUTIES AS NORMALLY REQUIRED*
>
> On Saturday, October 6, 1979, you failed to follow posted Driver's Instructions when you failed to weigh your dairy load before leaving Buena Park yard.
>
> Because of your neglect to follow instructions you were issued an overload ticket when you crossed the Highway Patrol scales.

> Failure to follow Driver's instructions will not be tolerated and you are hereby issued this Warning Letter and advised that any future occurrence of your failing to perform your duties will result in disciplinary action up to and including your being terminated.

The drivers are instructed that they will weigh their trailers before they leave the yard if they are going to cross a state highway scale. The grievant was aware of these instructions.

The following warning letter was issued on January 9, 1980:

> *FAILURE TO FOLLOW SUPERVISOR'S INSTRUCTIONS*
>
> On June 22, 1979, you were instructed by Ted Rookard that you were not to help the store put their Dairy products in their dairy box unless requested by the Store Manager. You were further instructed that you were to leave the Store immediately after unloading your milk and reloading the extra cases.
>
> On January 8, 1980, it was necessary for Ron Baker to give you these instructions again.
>
> Any future occurrence of your failing to follow Supervisor's instructions will result in additional disciplinary action up to and including your being terminated.

The grievant testified that he was assisting the receiver who was ill and had asked him to help. He did not have a request from the store manager and was apprehended by Mr. Baker.

On May 21, 1980, the following warning notice was issued:

> On Tuesday, May 20, 1980, you failed to properly count your load when you loaded at Weyerhaeuser

> Co. Your Driver's Pickup Tag shows you picking up (16) sixteen pallets. When your load was unloaded it had (20) pallets.
>
> It is a Driver's responsibility to count the merchandise he received and properly sign all paper work.
>
> Any future occurrence of your failing to perform your duties as normally required will result in additional disciplinary action.

The grievant claims that he counted the load correctly. This is not credible because re-counts were made by the receiving clerk and various supervisors, all indicating that the load exceeded the number of pallets recorded by the grievant.

On August 5, 1980, the Company issued the following warning notice:

> On Saturday, August 2, 1980, you failed to follow Driver's Instructions when you failed to take your breaks before returning to the yard from your second run. This is a violation of Driver's Instructions and cannot be tolerated.
>
> You refused to follow a Supervisor's Instructions when you were told to park your equipment and clock out.
>
> Any future occurrence of your failing to follow Driver's Instructions and/or directions from a Supervisor will not be tolerated and will result in your being terminated.

The grievant stated that after he completed his eight (8) hour day, Ted Rookard, Driver Supervisor, told him to "call it a day". He parked his tractor and took his lunch break which he had not taken earlier in the shift.

No satisfactory explanation was given for this insubordinate behavior, resulting in a warning that any further occurrence would result in termination.

On October 2, 1980, Mr. Baker, Mr. Garibaldi, and Mr. Hall, Union Stewart, (sic) discussed the grievant's *Driver's Daily Log* for the day. Mr. Baker stated that the grievant took excessive time in making deliveries to two Huntington Beach stores.

The grievant had neglected to pick up three pallets and when he reached the first stop and became aware of this, he returned to the Baldwin Park facility to pick them up and then continued his deliveries.

This is in violation of a policy that a driver is to call the transportation office if he encounters a problem with his deliveries. The grievant testified that he did not realize that the policy required him to call in. He also testified that he skipped his 15 minute break and on his return at the end of his shift he clocked out before parking and completing his paper work because he had taken excessive time.

At this meeting Mr. Baker gave the grievant one last chance and informed him that any future occurrence of failing to perform his job functions in accordance with company rules, standards, and policies would result in termination.

The following day, October 3, 1980, the grievant logged 15 hours, 55 minutes on the clock in violation of both Company and D.O.T. regulations. He also wrote in a 45 minute lunch period that he did not take.

Credible testimony was presented to show that the grievant's actions at store 439 resulted in a significant part of the delay in that he spent a considerable amount of time engaging in non-work related conversation with two store employees.

The testimony of Mr. Finnegan, Store Manager at 439, indicated that the grievant had not taken a 45 minute lunch break. The grievant entered this and other remarks

in his log after he was told by Finnegan that the store manager was going to report him.

The grievant's testimony is not credible. He states that the delay at Store 439 was caused by the store employees and that he inadvertently logged the 45 minute lunch because he was upset about the managers accusation that he was goofing off. The preponderance of evidence is to the contrary.

The grievant was suspended and subsequently discharged for repeated failure to perform work as required or ordered by Management.

The grievant failed to correct his actions despite repeated verbal and written warnings over a one year period of time. This included two notices that further occurrences would result in termination. It is found that progressive discipline for serious offenses was properly applied by the Company and the discharge of John Garibaldi was for just cause and in conformance with the terms of the collective bargaining agreement.

For this and for all of the aforementioned reasons, it is found that the grievant was discharged for cause.

DECISION AND AWARD

This matter was heard at the offices of the Union located at 140 South Marks Way in the City of Orange, California, commencing at 10:00 a.m. on Monday, December 8, 1980.

APPEARANCES

For the Company: Calvin D. Bussi, Labor Relations; Ronald J. Baker; Marshall D. Bohm; Gary L. Dean; Richard S. Lambright; Lee N. Finnegan.

For the Union: Jean H. Tyra, Business Agent;
John A. Garibaldi; Tom Cousimano;
Kenneth B. Hall.

Pursuant to the Agreement, the stipulations of the parties, and the evidence, the following award is made:

A. Lucky Stores, Inc. did not harass or unlawfully discriminate against the grievant for his participation in protected, concerted activities.

B. The grievant, John Garibaldi, was discharged for cause.

DATED: February 12, 1981
Long Beach, California

/s/ MELVIN R. DARROW
Melvin R. Darrow
Arbitrator

State of California, County of Los Angeles/ss.

On this 12th day of February, 1981, Melvin R. Darrow, known to me, appeared before me and executed the foregoing instrument.

/s/ MARIAN J. DARROW
Marian J. Darrow
Notary Public

[Seal]

APPENDIX B.
Judgment and Order of Remand.

United States District Court, Central District of California.

John Garibaldi, Plaintiff, vs. Lucky Stores, Inc., et al, Defendants. No. CV 82-1479-LTL(Kx).

Filed: January 28, 1983.

Defendant Lucky Stores, Inc. ("defendant"), having moved to dismiss the above-captioned action on the grounds that plaintiff's complaint fails to state a claim against defendant upon which relief can be granted, and all parties having had an opportunity to appear before the Court on January 17, 1983, upon due deliberation:

IT IS HEREBY ORDERED that defendant's motion to dismiss this action be deemed a motion for summary judgment and that said motion be granted as to plaintiff's first cause of action for the reasons stated from the Bench, plaintiff to bear defendant's costs of suit;

IT IS FURTHER ORDERED that the motion is denied as to plaintiff's second cause of action, and that said second cause of action be and is remanded to the Superior Court of the State of California, County of Orange.

Dated this 28th day of January, 1983.

/s/ L. T. Lydick
Lawrence T. Lydick
United States District Judge

APPENDIX C.

Reporter's Transcript of Proceedings.

United States District Court, Central District of California.

The Honorable Lawrence T. Lydick, District Judge.

John Garibaldi, Plaintiff, vs. Lucky Stores, Inc., a corporation, Defendant. No. CV 82-1479-LTL.

LOS ANGELES, CALIFORNIA;
MONDAY, JANUARY 17, 1983; 10:00 A.M.

THE CLERK: Item No. 6 on the calendar; CV 82-1479-LTL: John Garibaldi vs. Lucky Stores, Inc.

Counsel, please state your appearances.

MR. KNEZ: Good morning, your Honor. Fred Knez on behalf of the plaintiff.

MR. DONEY: Good morning, your Honor. Eric Doney on behalf of defendant Lucky Stores.

THE COURT: Again, Counsel, we have reviewed all of the material filed. Does anyone wish to be heard further?

MR. KNEZ: No, your Honor.

MR. DONEY: No, your Honor.

THE COURT: We are here on motion of defendant to dismiss.

First, there is no basis for plaintiff's argument that his filing of a petition for a writ of mandamus divests this Court of jurisdiction. Treated as a motion to stay, that motion is denied.

On the merits of the motion of defendant to dismiss, we note that on a 12(b)6 motion such as this, we take the complaint as we find it.

Although the complaint does not state a Section 301 claim, it may on its face state a claim under state law and the motion to dismiss is not the proper challenge to, at least, the second claim of cause of action; perhaps to neither.

Treating the motion to dismiss as a motion for summary judgment, since we have considered defendant's affidavits and exhibits, and reflecting our earlier judgment that the first cause of action is pursuant to Section 301 of the Labor Management Act and is clearly preempted by federal law; and further noting no conflicting evidence on the statute of limitations point relied on by defendant; we grant summary judgment to defendant on the first cause of action on the basis of the statute of limitations.

As to the second cause of action, defendant has not established that it is preempted — see Farmer v. Carpenter, 430 U.S. 290 (1977).

That cause of action is not within the jurisdiction of this Court and, therefore, as a discretionary matter, will be remanded to the state court.

Counsel for defendant will prepare a written order for the Court's review pursuant to applicable local rules.

MR. DONEY: Your Honor, if I may, the local rules of this Court provide that a deposition must be filed before it can be included in costs.

The deposition has not been filed to this date and as a courtesy to plaintiff's counsel I would ask that the order be delayed at this time so that the deposition can be filed so it could be included in costs.

THE COURT: If you want to make a written motion to that effect we will consider it sometime after receiving a response to it. But absent a stipulation to such a delay in the order, the order motion will be denied.

MR. KNEZ: No stipulations.

THE COURT: Proceed. Next case.

(Whereupon the above-entitled proceeding was concluded.)

Certificate.

United States District Court, Central District of California.

The Honorable Lawrence T. Lydick, District Judge.

John Garibaldi, Plaintiff, vs. Lucky Stores, Inc., a corporation, Defendant. No. CV 82-1479-LTL.

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Central District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above-entitled cause on Monday, January 17, 1983, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 18th day of January, 1983.

/s/ Freda Mendelsohn
Official Reporter

APPENDIX D.

OPINION

United States Court of Appeals, For the Ninth Circuit.

John Garibaldi, Plaintiff-Appellant, v. Lucky Food Stores, Inc., Defendant-Appellee.	No. 83-5686, D.C. No. CV 82-1479-LTL. OPINION

Filed: February 27, 1984.

Appeal from the United States District Court for the Central District of California

The Honorable Lawrence T. Lydick, Presiding.

Argued and Submitted: October 5, 1983.

BEFORE: FLETCHER and NELSON, Circuit Judges, PRICE,* District Judge

FLETCHER, Circuit Judge:

Plaintiff, John Garibaldi, an employee suing for damages in connection with an alleged wrongful discharge, appeals from a summary judgment in favor of his employer defendant Lucky Food Stores. We reverse on the grounds that the action was improperly removed from state court and that the district court lacked jurisdiction.

The case turns on whether plaintiff's claims are preemptive.

I

FACTUAL BACKGROUND

Garibaldi was employed by Lucky Food Stores beginning in October 1969 as a boxboy. After a three-year leave of absence for military service from 1970 to 1973 he returned as a journeyman clerk. In April, 1977 he

*Hon. E. Dean Price, United States District Judge for the Eastern District of California, sitting by designation.

was transferred to the position of truck driver, in which position he continued until he was discharged in October 1980.

Garibaldi alleges that his discharge was wrongful and was the culminating act of a pattern of harrassment arising out of an incident that occurred on March 27, 1979. Garibaldi noticed that the load of milk he was delivering was spoiled. He reported this to his employer, who instructed him to go ahead and deliver the milk. Instead, he notified the local health department, which condemned the milk and ordered that it not be delivered.

At all times relevant to this action Garibaldi was a member of the International Brotherhood of Teamsters, Warehousemen and Helpers of America, Local 952 (Teamsters Union) and was covered by a collective bargaining agreement. When he was discharged on October 23, 1980, he filed a grievance that was processed through arbitration. The arbitrator found that he was discharged for cause.

On October 2, 1981, Garibaldi filed a complaint in California Superior Court for damages for bad faith, wrongful termination and intentional infliction of emotional distress. He alleged that he was discharged in violation of the public policy of the State of California because of his report to the health authorities.

After the complaint had been filed, but before service, Lucky Food Stores removed the case to federal court. Garibaldi moved to remand the case to state court. The district court held that the removal was timely[1] and that

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[1]The timeliness of removal is not contested on appeal. The District Court held that the defendant could remove upon receipt of complaint "by service or otherwise" according to the statute. Since Lucky Food Stores received a copy of the complaint through some means, it could seek removal. *See Love v. State Farm Mutual Auto Ins. Co.*, 542 F.Supp. 65, 67-68 (N.D. Ga. 1982); *Tyler v. Prudential Insurance Co.*, 524 F.Supp. 1211, 1213 (W.D. Pa. 1981).

it had jurisdiction over the first cause of action for wrongful termination under 29 U.S.C. § 185 (§ 301 of the Labor Management Relations Act (LMRA)),[2] on the basis of *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209 (9th Cir. 1980). The court apparently retained jurisdiction of the second cause of action for intentional infliction of emotional distress under the doctrine of pendent jurisdiction.

Lucky Food Stores then filed a motion to dismiss the first cause of action on statute of limitations grounds, which it argued was 100 days, based on its characterization of the suit as an appeal from an arbitrator's award.[3] The district court treated the motion as one for summary judgment, granted judgment on the first cause of action and remanded the second cause of action to state court. Garibaldi appealed.

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[2]Section 301(a) states that

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1976). The Supreme Court has held that the purpose of this statute was to require the federal courts to fashion a uniform body of federal law for the enforcement of national labor laws. *See Textile Workers Union of America v. Lincoln Mills of Alabama*, 353 U.S. 448 (1957); *Local 174, Teamsters v. Lucas Flour*, 369 U.S. 95, 103-06 (1962).

[3]*See* Cal. Civ. Proc. Code § 1288 (West 1982). This statute of limitations is not applicable except to the extent that it may be applicable in state court to other than section 301 claims. *See Del Costello v. Teamsters Union*, ___ U.S. ___, 103 S.Ct. 2281 (1983) (holding that the statute of limitations applicable to a section 301 suit was the same as that which applies to suits against an employer for breach of the collective bargaining agreement).

II

ISSUES PRESENTED

Lucky Food Stores argues that removal was proper and that a state action for wrongful termination is preempted by the LMRA. Garibaldi argues that his claim is not preempted, and, in any event, removal based on preemption is improper. Both concede that the proper statute of limitations is determined by the resolution of the preemption issue. Since we hold that Garibaldi's claim is not preempted we need not decide whether removal based on preemption would be improper.[4]

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[4]The second cause of action for intentional infliction of emotional distress is not before this court. Although Lucky Food Stores asks us to hold that this claim is preempted also, it has not cross-appealed the remand of that cause of action. To the extent that Lucky Food Stores urges preemption of this cause of action as an alternate basis for jurisdiction, we reject the argument. The alleged tort is not the "artful pleading" of a federal claim. *See* discussion *infra*. Whether a claim for intentional infliction of emotional distress is preempted by the NLRA depends on the degree of outrageousness of the conduct and the manner in which the conduct was performed. *See Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 305-06 (1977); *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, 429 (9th Cir. 1983). Since preemption is a defense in this context and the federal question cannot be raised affirmatively on the face of the complaint, this cause of action is not a basis for removal. *See* discussion *infra*. Our decision in *Beers v. Southern Pacific Transportation Co.*, 703 F.2d 425, does not suggest otherwise since the plaintiff in that case failed to object to removal. *See Grubbs v. General Electric Credit Corp.*, 405 U.S. 699, 702 (1972). Furthermore, Beers' complaints "referred to work conditions, disciplinary procedures, representation rights covered by or substantially related to the collective bargaining agreement." By contrast, Garibaldi alleges that the emotional distress arose out of a claim that is not preempted. We recognize, however, that the facts may not support his allegations and that his claim may be preempted under the *Farmer* analysis. The final resolution of the preemption issue as to this cause of action is for the state court. We decide only that this is not a possible alternate ground for federal jurisdiction.

III

DISCUSSION

A. Removal Jurisdiction Rests on a Federal Claim Stated in Complaint.

Removal of an action under 28 U.S.C. § 1441(b) (1976) depends solely on the nature of the plaintiff's complaint, and is properly removed only if "a right or immunity created by the Constitution or laws of the United States [constitutes] an element, and an essential one, of the plaintiff's cause of action." *Gully v. First National Bank in Meridian*, 299 U.S. 109, 112 (1936). The plaintiff is the master of his or her own complaint and is free to ignore the federal cause of action and rest the claim solely on a state cause of action. *See The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913); *Jones v. General Tire & Rubber Co.*, 541 F.2d 660, 664 (7th Cir. 1976); *La Chemise Lacoste v. Alligator Co.*, 506 F.2d 339, 346 (3d Cir. 1974), *cert. denied*, 421 U.S. 937 (1975). Based on these propositions, it follows that "a suit brought upon a state statute does not arise under an act of Congress or the Constitution of the United States because prohibited thereby." *Gully v. First National Bank*, 299 U.S. at 116.

However, where the state claim has been preempted by federal law, it does not follow that the federal court has jurisdiction. This circuit has repeatedly held that preemption, as a defensive allegation, is not grounds for removal. *See Nalore v. San Diego Federal Savings and Loan Association*, 663 F.2d 841, 842 (9th Cir. 1981), *cert. denied, sub nom. Great American Federal Savings and Loan Association v. Nalore*, 455 U.S. 1021 (1982); *Guinasso v. Pacific First Federal Savings & Loan Association*, 656 F.2d 1364, 1367 (9th Cir. 1981), *cert. denied*, 455 U.S. 1020 (1982); *Washington v. American League of Professional Baseball Clubs*, 460 F.2d 654, 660 (9th Cir. 1972).

Although ordinarily a preempted claim may not be removed to federal court, the "artful pleading" doctrine provides the rationale for the assertion of federal jurisdiction in some cases. *See generally* Wright, Miller & Cooper, *Federal Practice and Procedure* § 3722 (1976). This doctrine allows the removing court to look at the true nature of the plaintiff's complaint when the plaintiff has attempted to avoid a federal cause of action by relying solely on state law in the complaint. *See Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189, 191 (9th Cir. 1983). We have followed this doctrine in allowing removal based on preemption in certain labor cases. *See Schroeder v. Trans World Airlines, Inc.*, 702 F.2d 189; *Fristoe v. Reynolds Metals Co.*, 615 F.2d 1209, 1211-12 (9th Cir. 1980); *Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367, 1369 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978); *Johnson v. England*, 356 F.2d 44 (9th Cir.), *cert. denied*, 384 U.S. 961 (1966).

Lucky Food Stores asserts that the suit is properly removed under the artful pleading doctrine because Garibaldi's claim is preempted. However, Lucky Food Stores has missed the second step in the analysis.[5]

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[5]At first glance, it may seem contradictory that in *Fristoe* and *Schroeder* we accepted jurisdiction although we decided that the claims were preempted and in *Guinasso* and *Nalore* we dismissed for lack of jurisdiction *because* the claims were preempted. The difference lies in the nature of the claims made.

The distinction between an artfully pled complaint and one that is preempted, but not removable, lies in whether the removing court must "look beyond plaintiff's complaint, to the petition for removal or the answer, to find a federal question" or whether "the facts alleged were sufficient to state a federal cause of action" on the face of the complaint. *State of California v. Glendale Federal Savings and Loan Association*, 475 F.Supp. 728, 732 (C.D. Cal. 1979). The former is not removable; the latter is removable because artfully pled.

In *Schroeder*, the employees filed an action in state court alleging that TWA was engaged in unlawful business practices not authorized by the collective bargaining agreement and that these

B. A Wrongful Termination Claim Based on State Public Policy is Not Preempted.

The issue of whether a claim for wrongful termination based on violation of state public policy is preempted by

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practices violated the California Business and Professions Code. The court observed that it was clear that the plaintiffs were attempting to *avoid* federal law and that *exclusive* jurisdiction over disputes under the Railway Labor Act existed in federal court.

Similarly, in *Fristoe v. Reynolds Metals Co.,* 615 F.2d 1209, the plaintiff filed a breach of contract action in state court after going through grievance procedures. The court held that the "recharacterization of Fristoe's complaint as one arising under § 301 is required by federal preemption doctrines." 615 F.2d at 1212. Thus, removal was proper because an allegation of breach of a collective bargaining agreement *states on its face* an action under the LMRA.

In both *Schroeder and Fristoe,* the essence of the argument was that "federal law not only displaces state law but also confers a federal remedy on the plaintiffs or compels them to rely, explicitly or implicitly, on federal propositions." *Guinasso v. Pacific First Federal Savings & Loan Association,* 656 F.2d 1364, 1367.

By contrast, in *Nalore v. San Diego Federal Savings & Loan Association,* 663 F.2d 841, the plaintiff claimed that state law precluded a "due-on-sale" clause in a promissory note and trust deed. The defendant bank argued that the federal law preempted state prohibition of due-on-sale clauses, not that any such allegation stated a cause of action under federal law. Similarly, in *Guinasso v. Pacific First Federal Savings and Loan Association,* 656 F.2d 1364, the plaintiff brought suit under Oregon common law for breach of contract, breach of trust duties, and unjust enrichment to recover interest on escrow accounts. The bank argued that regulations of the Federal Home Loan Bank Board preempted the Oregon claims. In both of these cases, the preemption argument focused on the proposition that the state could not regulate the field, not that the complaint stated a federal cause of action. The preemption was *defensive* and not proper grounds for removal. Thus, in this case, instead of dismissing the case initially under the proposition that preemption cannot be a basis for removal, we look to the substance of Garibaldi's claim to see if it states on its face a federal cause of action, *i.e.,* if federal law requires Garibaldi to rely on a federal remedy in this case. Labor law is not an area where federal law totally occupies the field. *See Vaca v. Sipes,* 386 U.S. 171, 180 (1967).

the LMRA is one of first impression.[6] In *Guinasso v. Pacific First Federal Savings and Loan Association*, 656

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[6]We note that two district courts in this circuit have considered similar, but distinguishable issues. In *Taylor v. St. Regis Paper Co.*, 560 F.Supp. 546 (C.D. Cal. 1983), the plaintiff alleged wrongful discharge and breach of covenant (sic) and fair dealing and that he was discharged in retaliation for filing worker's compensation claims. The district court held the contractual claims preempted, which is consistent with the distinctions made in this opinion. The court did not address the preemption of the retaliatory discharge claim under federal labor law, for it found that the California Worker's Compensation Appeal Board has exclusive jurisdiction over the charge. By implication the cause of action was not preempted. Similarly, in *Sklios v. Brotherhood of Teamsters*, 503 F.Supp. 123 (N.D. Cal. 1980); *rev'd on other grounds*, 672 F.2d 923 (9th Cir. 1980), the court held that a cause of action for wrongful discharge in violation of a collective bargaining agreement was preempted by section 301 of the LMRA. *See Fristoe*, 615 F.2d at 1212.

We note that the Seventh Circuit recently held that a state claim for retaliatory discharge was preempted by the Railway Labor Act (RLA), 45 U.S.C. § 153 (1976). *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045, (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. ___ (January 23, 1984). Although the court reached the opposite result from our holding, the court's analysis is entirely consistent with ours. The plaintiff in *Jackson* alleged that he was fired in retaliation for filing a claim under the Federal Employee's Liability Act, 45 U.S.C. §§ 51-60 (FELA) in violation of Texas state law. In discussing *Farmer* and *Sears Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978), the court applied the same analysis we use here — examining the state interest involved and the potential for interference with the federal scheme. 717 F.2d at 1051-54. It found that the RLA provides a stronger case for preemption than the NLRA. 717 F.2d at 1052. *See Magnuson v. Burlington Northern, Inc.*, 576 F.2d 1367 (9th Cir.), *cert. denied*, 439 U.S. 930 (1978). The court recognized that under the NLRA, "it is the *objective* of certain conduct, rather than the mere *exercise* thereof, that is relevant to determining whether actions are prohibited by the NLRA." *Id* (emphasis added). We note the similarity between *Jackson* and the recent Ninth Circuit case of *Schroeder v. Trans World Airlines*, 702 F.2d 189 (9th Cir. 1983).

F.2d 1364 (9th Cir. 1081), *cert. denied,* 455 U.S. 1020 (1982), however, we engaged in the inquiry that we should undertake in this case: Does the federal statute and regulatory scheme leave room for state regulation? In *Guinasso,* the plaintiff brought suit under Oregon common law for breach of contract, breach of trust duties, and unjust enrichment to recover interest on escrow accounts. The bank argued successfully that regulations of the Federal Home Loan Bank Board preempted the Oregon claims. *See also Nalore v. San Diego Federal Savings and Loan Association,* 663 F.2d 841 (9th Cir. 1981) *cert. denied, sub nom. Great American Federal Savings and Loan Association v. Nalore,* 455 U.S. 1021 (1982). Here we examine the sweep of the LMRA.

The district court in the case before us concluded that *Fristoe v. Reynolds Metal* (sic) *Co.,* 615 F.2d 1209 (9th Cir. 1980) compelled removal to federal court. Both *Fristoe* and our case are labor cases. In both, the employee submitted his grievance to arbitration; in both, the plaintiff sought damages for wrongful discharge. But a significant difference exists between this case and *Fristoe*: Fristoe sought damages for breach of a collective bargaining agreement, while Garibaldi rests his claim for wrongful discharge on violation of state policy. The *Fristoe* court recharacterized Fristoe's complaint as necessarily an assertion of a violation of section 301 of the LMRA and therefore an assertion of a federal claim. Our task is to decide whether a claim for wrongful termination based on violation of state public policy must also be characterized as a federal claim. Although we have no section 301 case the Supreme Court has provided a great deal of guidance in recent cases dealing with preemption under the National Labor Relations Act (NLRA).

1. *The Test for Preemption in The Labor Field.*

In *New York Telephone Co. v. New York State Dept. of Labor*, 440 U.S. 519 (1979), the Supreme Court considered the question of whether the NLRA prohibited the State of New York from paying unemployment compensation to strikers. The Court held that the New York law was not preempted, even though the plurality recognized that the law provided financial support to striking employees and added to the burdens of struck employers. 440 U.S. at 531.[7] Nonetheless, the plurality recognized that

> [a]lthough the class benefitted is primarily made up of employees in the State and the class providing the benefits is primarily made up of employers in the State, and although some of the members of each class are occasionally engaged in labor disputes, the general purport of the program is not to regulate the bargaining relationships between the two classes but instead to provide an efficient means of insuring employment security in the State.

440 U.S. at 532-33. Justices Blackmun and Marshall concurred, stating that "[t]he crucial inquiry is whether the exercise of state authority 'frustrate[s] effective implementation of the Act's processes, . . .'" 440 U.S. at 550 (Blackmun, J., concurring). Justice Brennan ap-

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[7]The plurality adopted the test set forth in Cox, *Recent Developments in Labor Law Preemption*, 41 Ohio St.L.J. 277 (1980). *See New York Telephone*, 440 U.S. at 532-33. Professor Cox argues that in enacting federal labor laws Congress intended to preempt only state laws regulating collective activity, not state laws of general applicability. *See* Cox, *supra* at 1355. This view was not adopted by the whole court. Although Justice Brennan seemed to be in partial agreement, Justices Blackmun and Marshall clearly disagreed, as did Justices Powell, Stewart, and the Chief Justice in their dissent. The result we reach here would meet the Cox test. *See* Comment, *NLRA Preemption of State Wrongful Discharge Claims*, 34 Hast.L.J. 635, 657, 659-62 (1983).

peared to be in general agreement with the plurality's test, although he based his concurrence on the legislative history. *See* 440 U.S. at 546-47 n.* (Brennan, J., concurring). The distinction between the two approaches seems to be one of emphasis. Justice Blackmun characterized the plurality opinion as assuming that preemption is absent "unless 'compelling congressional direction' indicates otherwise," and asserts that his approach is that preemption is present unless evidence exists that Congress intended otherwise. 440 U.S. at 549 (Blackmun, J., concurring).

Regardless of where one places the emphasis, the essence of the exercise is a balance of state and federal interests. In *Farmer v. United Brotherhood of Carpenters and Joiners*, 430 U.S. 290 (1977), the court held that the NLRA did not preempt a tort action for intentional infliction of emotional distress under California law.

> Our cases indicate, however, that inflexible application of the doctrine [of preemption in industrial relations] is to be avoided, especially where the State has a substantial interest in regulation of the conduct at issue and the State's interest is one that does not threaten undue interference with the federal regulatory scheme.
>
> * * *
>
> The State . . . has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. That interest is no less worthy of recognition because it concerns protection from emotional distress caused by outrageous conduct, rather than protection from physical injury, as in *Russell* [*Automobile Workers v. Russell*, 356 U.S. 634 (1958], or in damage to reputation, as in *Linn* [*v. Plant Guard Workers*, 383 U.S. 53 (1966)]. Although recognition

> of the tort of intentional infliction of emotional distress is a comparatively recent development in state law . . ., our decisions permitting state jurisdiction in tort actions based on violence or defamation have not rested on the history of the tort at issue, but rather on the nature of the State's interest in protecting the health and well-being of its citizens.

430 U.S. at 302-03 (citations omitted).

The Court was nonetheless careful to limit its holding. The conduct alleged must be "outrageous" and the tort, if occurring in the employment relationship, must be "a function of the particularly abusive manner in which the discrimination is accomplished rather than a function of the actual or threatened discrimination itself." 430 U.S. at 305.

To apply the *Farmer* approach to the case at hand we must look at the nature of the State interests involved.[8]

2. *California Wrongful Termination Law.*

An action for wrongful termination exists under California law in three circumstances: when the termination would violate (1) public policy, (2) a statute, or (3) an express or implied contract term that the employee was hired to serve so long as he or she performed to the satisfaction of the employer. *See Cleary v. American Airlines,* 111 Cal.App.3d 443, 450 168 Cal.Rptr. 722, 726 (1980); *Patterson v. Philco Corp.,* 252 Cal.App.2d 63, 65 60 Cal.Rptr. 110 (1967).[9]

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[8]This approach is consistent with the approach taken by this circuit in *Beers v. Southern Pacific Transport Co.*, 703 F.2d 425 (9th Cir. 1983).

[9]Lucky Food Stores argues that California wrongful termination law does not apply to union employees. That issue has never been addressed by the California courts. We see nothing in the cases addressing wrongful termination in violation of public policy that suggests the distinction. The argument would have considerable

The public policy exception was established by the California Supreme Court in *Tameny v. Atlantic Richfield Co.*, 27 Cal.3d 167, 164 Cal.Rptr. 839 (1980), where the court allowed a cause of action for wrongful discharge arising out of the plaintiff's refusal to fix retail gasoline prices in violation of federal law. The Court held that an "employer cannot condition employment upon required participation in unlawful conduct by the employee." 27 Cal.3d at 178, 164 Cal.Rptr. at 845. The court recognized that the "employer's obligation to refrain from discharging an employee who refuses to commit a criminal act does not depend on any express or implied ' "promises set forth in the [employment] contract" ' . . ., but rather reflects a duty imposed by law upon all employers in order to implement the fundamental public policies embodied in the state's penal statutes." 27 Cal.3d at 176; 164 Cal.Rptr. at 844.[10] Thus, it is clear that California's interest in providing a cause of action for violation of public policy or a statute is the enforcement of the underlying statute or policy, not the regulation of the employment relationship.

In contrast, California's interest in job security based on an express or implied contractual term of employment is quite different. In *Cleary v. American Airlines*, 111 Cal.App.3d 443, 168 Cal.Rptr. 722, the court held that "the

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force in a case such as *Cleary v. American Airlines*. Absent California law to support Lucky Food Stores' contention, we decline to look beyond Garibaldi's assertion of a state law claim. Removal is judged by the face of the complaint.

[10]Other states have adopted doctrines similar to *Tameny*. *See, e.g., Trombetta v. Detroit, Toledo & Iron R.R.*, 81 Mich.App. 489, 496, 265 N.W.2d 385, 388 (1978) (discharge for refusal to manipulate pollution control reports — not preempted by RLA); *Pierce v. Ortho Pharmaceutical Corp.*, 84 N.J. 58, 417 A.2d 505 (1980) (protesting testing harmful drug on humans); *Ness* (sic) *v. Hocks*, 272 Or. 210, 536 P.2d 512 (1975) (discharge for reporting for jury service).

longevity of the employee's service, together with the expressed policy of the employer [of adopting specific procedures for adjudicating employee disputes], operate as a form of estoppel, precluding any discharge of such an employee by the employer without good cause." 111 Cal.App.3d at 455, 456, 168 Cal.Rptr. at 729. The court departed from the concept that "at will" employees could be terminated without any reason whatsoever, *see Marin v. Jacuzzi,* 224 Cal.App.2d 549, 553, 36 Cal.Rptr. 880 (1964), and applied in the employment context the "covenant of good faith and fair dealing" which it had implied into insurance contracts. *See Communale v. Traders & General Insurance Co.,* 50 Cal.2d 654, 658, 328 P.2d 198 (1958). Although the court used *Tameny* as precedent, it went beyond it to protect a different type of interest, protecting "certain implied contract rights to *job security,* necessary to ensure social stability in our society." 111 Cal.App.3d at 455; 168 Cal.Rptr. at 729 (emphasis added).

3. *Garibaldi's Claim.*

Garibaldi has unequivocally pled wrongful termination in violation of public policy. He argues that he was discharged because he reported a shipment of adulterated milk to the health officials after his supervisors ordered him to deliver it. Lucky Food Stores admit in their answer that the milk was condemned by the health authorities. Sale or delivery of adulterated milk is prohibited by California law. *See* Cal. Agric. Code § 32906 (West 1968) (unlawful "to sell . . . or deliver . . . any impure, polluted, tainted, unclean, unwholesome, stale or adulterated milk . . .").

Garibaldi's "whistle blowing" to protect the health and safety of the citizens of California is exactly the type of conduct that the California Supreme Court protected in *Tameny.* The Supreme Court's decision in *Farmer* rested

explicitly on the "State's interest in protecting the health and well-being of its citizens." 430 U.S. at 303. *See also Malone v. White Motor Corp.*, 435 U.S. 497, 513 n.13 (1978); *Teamsters Union v. Oliver*, 358 U.S. 283, 297 (1959).

Garibaldi's allegation that he was discharged in violation of public policy comports with the limitations of the *Farmer* holding. As in *Farmer*, Garibaldi's claim is a "function of the . . . *manner*" in which the conduct was exercised "rather than a function of the . . . [conduct] itself." 430 U.S. at 305. In contrast, if Garibaldi had alleged that he was terminated in violation of the collective bargaining contract, or, based on *Clearly v. American Airlines*, in violation of an implied covenant not to terminate without cause, the result might be otherwise.[11]

A claim grounded in state law for wrongful termination for public policy reasons poses no significant threat to the collective bargaining process; it does not alter the economic relationship between the employer and employee. The remedy is in *tort*, distinct from any contractual remedy an employee might have under the collective bargaining contract. It furthers the state's interest in protecting the general public — an interest which transcends the employment relationship. *See New York Telephone*, 440 U.S. at 533.[12]

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[11]As discussed in note 9, *supra*, the rationale of *Cleary* is of doubtful applicability in this case. The court relied strongly on the lack of job security possessed by *at will* employees under the former California common law. No such lack of job security exists for *union* employees. This is exactly the type of distinction the *Farmer* court had in mind in requiring that the conduct be "outrageous" and performed in a manner outside the scope of the normal labor relations context.

[12]A recent decision supports the result we reach in this case. In *Machinists Automotive Trades District Lodge No. 190 v. Utility Trailer Sales*, 141 Cal. App. 3d 80, 190 Cal. Rptr. 98 (1st Dist.),

(footnote continued on following page)

4. *The Effect of the Arbitration.*

Lucky Food Stores also argues that Garibaldi should be barred from asserting a remedy in court because he chose to arbitrate his grievance, and attempts to characterize Garibaldi's action as an appeal from an arbitration award for statute of limitation purposes. This argument is not persuasive.

In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), the Supreme Court held that the plaintiff could pursue his remedy under Title VII of the Civil Rights Act even though he previously had submitted his grievance to arbitration, alleging in the arbitration that he was discharged on the basis of race and the arbitrator had found that he was "discharged for just cause." 415 U.S. at 42. "In filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these contractual and statutory rights is not violated merely because both were violated as a result of the same factual occurrence." 415 U.S. at 49-50. The Court, recognizing that arbitrators look to the "industrial common law of the shop" and "[have] no general authority to invoke public laws that conflict with the bargain between the parties. . . ." 415 U.S. at 53, was unwilling to foreclose the employee from as-

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appeal dismissed ___ U.S. ___, 104 S.Ct. 520 (1983), the California Court of Appeals held that an employee's statutory right of indemnity by his employer under state law was not preempted by federal labor law. The court said,

> the fact that a matter is a subject of collective bargaining does not preclude the state from adopting standards to protect the welfare of the workers . . . . Bowser's statutory right to indemnity is independent of any contractual right.

190 Cal. Rptr. at 100, citing *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974).

The Supreme Court dismissed the appeal for want of a substantial federal question. ___ U.S. ___, 104 S.Ct. 520. A dismissal for want of a substantial federal question is a decision on the merits. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

serting rights created independently of the collective bargaining agreement.[13] We find the same consideration relevant here as in the preemption context — the state law may protect interests separate from those protected by the NLRA provided the interests do not interfere with the collective bargaining process.[14] Since we find that the state claim is not preempted, we do not find the prior arbitration a barrier.

IV
CONCLUSION

We hold that the claim for wrongful termination based on state public policy is not preempted by section 301 of the LMRA. Removal was improper. Because the district court had no jurisdiction over this case, we reverse and remand to the district court with instructions to remand to the California state court.

REVERSED and REMANDED.

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[13]The fact that Alexander's additional remedy was one created by *federal* rather than *state* law does not diminish the force of the argument. First, the focus of *Alexander* was the preclusive effect of the arbitration, not the preemptive effect of federal law — a supremacy clause issue. Second, the Supreme Court held in *Colorado Anti-Discrimination Comm'n v. Continental Air Lines, Inc.*, 372 U.S. 714 (1963), that a discrimination action under Colorado law was not preempted by the RLA. *See* 372 U.S. at 724. The Supreme Court of Oregon has recognized the implications of *Alexander* for preemption. *See Vaughn v. Pacific Northwest Bell Telephone Co.*, 289 Or. 73, 86, 611 P.2d 281, 289 (1980). *See also* Comment, *supra* note 7 at 658 n.134; Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 Va.L.Rev. 481, 530 n.216; Note, *A Common Law Action for the Abusively Discharged Employee*, 26 Hast.L.J. 1435, 1467-63 (1975); Comment, *Intimations of Federal Removal Jurisdiction in Labor Cases: The Pleadings Nexus*, 1981 Duke L.J. 743, 750-56.

[14]*See* Comment, *supra* note 7 at 658.